No. 80-1609

MAY 27 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

PROLERIZED NEW ENGLAND COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an employee at a waterfront plant for the processing and shipment of scrap metal, who regularly maintains a machine that cuts scrap steel into cargo-sized lengths integral to the loading process and who also occasionally participates in the loading of ships and in the repair of shiploading equipment, is engaged in "maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 637 F.2d 30. The administrative law judge's original decision and order (Pet. App. 19a-32a) and his decision and order on remand (Pet. App. 41a-77a) are unreported. The original opinion of the Benefits Review Board (Pet. App. 33a-40a) is reported at 8 B.R.B.S. 1. The second opinion of the Benefits Review Board (Pet. App. 78a-87a) is reported at 11 B.R.B.S. 576.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1980 (Pet. App. 88a). The petition for a writ of certiorari was filed on March 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Prolerized New England Company operates a scrap metal business on the shore of the Mystic River in Everett, Massachusetts. Petitioner's metal processing facility has its own dock and shiploading equipment, and almost all of the processed scrap steel is loaded aboard ships by Prolerized's employees and shipped from its dock (Pet. App. 2a-3a, 22a-23a, 34a).

Prolerized buys scrap metal in the form of junked cars, refrigerators, railroad ties, and the like. It processes the scrap in one of two ways, depending on the kind of material involved. Approximately 60% of the metal is processed in the "Prolo Mill," a large machine that separates ferrous metal from plastic, glass, and non-ferrous metals and converts the metal into fist-sized chunks called "prolo steel" (Pet. App. 2a-3a, 22a, 34a). The remaining 40% of the scrap metal is processed by the "Shear," another huge machine that cuts steel into lengths of four feet or less that will fit easily into the holds of ships (*id.* at 3a, 23a, 34a). Both prolerized and sheared steel is stockpiled in petitioner's yard. Sheared steel is eventually moved from the stockpiles to the dock by truck, where it is loaded aboard ships by crane (*id.* at 3a, 34a). Prolo steel is loaded using a bulldozer and shiploader conveyor (*id.* at 34). Ships arrive at petitioner's dock on an average

of once a month and usually are loaded in two or three days (*id.* at 3a, 23a).

Respondent Richard F. McNeil was employed by Prolerized as a maintenance man to maintain and repair all company equipment, including the Shear and the Prolo Mill (Pet. App. 3a, 23a, 34a). Although McNeil was not assigned to the shiploader crew, which Prolerized employed to load ships and to maintain its shiploading equipment, he was required to assist the shiploaders whenever they were shorthanded (*id.* at 4a, 23a-24a). He was also required on occasion to go aboard a vessel to repair shiploading equipment or to assist in the loading operation itself. In addition, he occasionally had to man lines on the dock (*id.* at 38a). When McNeil arrived at work each day, he did not know to which part of his employer's operation he would be assigned (*id.* at 4a, 23a, 24a, 35a).[1]

On August 21, 1975, respondent McNeil was injured in the course of his employment. McNeil had worked for Prolerized as a maintenance man for two and one-half years before his injury. At the time of his injury and for the preceding several months, McNeil had been assigned to the night shift, during which Prolerized's processing machinery was not in operation (Pet. App. 3a-4a, 23a). On the night shift, McNeil performed routine maintenance and repairs on both the Prolo Mill and the Shear. He also changed the filters on the Shear each Saturday morning (*id.* at 11a-12a, 24a, 29a-30a). Before McNeil's injury, no ship had been loaded at the Prolerized dock for at least two months (*id.* at 4a). McNeil was in-

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[1] Like all of Prolerized's yard employees, McNeil was represented by the International Longshoremen's Association Local 1908, AFL-CIO (Pet. App. 23a).

jured while replacing some of the wheels and pins on the conveyor used to feed scrap metal into the Prolo Mill. He fell 15 feet from the apron of the conveyor to the ground, seriously injuring his shoulder, arm, and hand (*ibid.*).

Respondent McNeil filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* Petitioners, Prolerized and its workers' compensation insurance carrier, Hartford Accident & Indemnity Company, disputed the claim on several grounds, only one of which they press in this Court. Petitioners argued that respondent McNeil was not engaged in maritime employment and therefore was not a covered "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3). An administrative law judge, writing before this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), acknowledged that McNeil occasionally performed maritime duties (Pet. App. 30a) but ruled that coverage under the Act is "governed by the nature of a claimant's employment at the time of his injury" (*id.* at 26a). The administrative law judge concluded that McNeil was not covered, because, at the time of his injury, he was "employed in the manufacturing, or reprocessing, phase of Employer's operation which was wholly separate and distinct from the loading of vessels" (*id.* at 30a).

Respondents McNeil and the Director, Office of Workers' Compensation Programs, appealed to the Benefits Review Board under 33 U.S.C. (& Supp. III) 921(b). The Board reversed, relying on this Court's statement in *Caputo* (432 U.S. at 273) that Congress intended to cover "persons whose employment is such

that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity." In light of *Caputo*'s focus on a claimant's overall occupation, the Board ruled that the administrative law judge erred by inquiring solely into the nature of McNeil's activities at the time of his injury. The Board stressed that, under the facts found by the administrative law judge, McNeil's job required him to maintain and repair all company equipment, including "the shearer machine, used in cutting the scrap metal to four-foot lengths in order to fit into the holds of ships, and the gantries and shiploader used in loading the scrap metal onto the dockside ships" (Pet. App. 38a). In addition, the Board observed (*ibid.*), McNeil was occasionally called upon to repair loading equipment aboard ship, to man lines on the dock, and otherwise to assist in the loading operation. Based on these facts and on earlier Board decisions holding that maritime employment includes the maintenance and repair of loading machinery[2] and the operation of a shear machine cutting metal destined for export,[3] the Board concluded (Pet. App. 39a) that McNeil was "clearly engaged in maritime employment and covered part of his workday or workweek" and that therefore, "[a]pplying the 'continuous coverage' reasoning of Congress and the Court in *Caputo/Blundo*," McNeil's overall occupation qualified as maritime employment, and he satisfied the status test of Section 2(3).

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[2] *Vinciquerra* v. *Transocean Gateway Corp.*, 1 B.R.B.S. 523 (1975); *Stecz* v. *Sea-land Service, Inc.*, 6 B.R.B.S. 291 (1977).

[3] *Shoemaker* v. *Schiavone & Sons*, 2 B.R.B.S. 257 (1975).

On remand, the administrative law judge found that respondent McNeil had suffered a permanent partial loss of the use of his right arm and that he was temporarily totally disabled. The administrative law judge entered a compensation order (Pet. App. 41a-77a), and petitioners appealed to the Benefits Review Board. The Board refused to reconsider the coverage issue and adjusted the compensation award (*id.* at 78a-87a). Petitioners then sought judicial review under 33 U.S.C. 921(c), and the court of appeals affirmed the Board's ruling.

The court ruled that the Board was correct in characterizing the Shear as "an integral part of the loading operation" (Pet. App. 9a-10a). The court observed that, unlike the Prolo Mill, which "actually changes the composition of scrap metal by separating it into component parts," the Shear "merely changes the shape of scrap steel to prepare it for shipment" (*id.* at 9a). Accordingly, the court approved the Board's determination that respondent McNeil's regular maintenance, repair, and operation of the Shear were part of the overall "process of moving cargo from the land transportation on which it arrived to the ships on which it left" (*id.* at 10a). The court also agreed with the Board that, when McNeil's work on the Shear was considered along with his occasional manning of lines on the dock and his occasional boarding of ships to repair loading equipment or to assist in positioning a collar and chute over the hold prior to loading, it justified the conclusion that "a substantial portion of McNeil's duties involved longshoring activity" (*id.* at 11a). On this basis, the court held that McNeil was engaged in maritime employment as a matter of occupation.

In response to petitioners' complaint that the Board had impermissibly conducted its own review of the record to determine that the purpose of the Shear was "to cut steel to fit into the holds of ships," the court observed that the administrative law judge had not made any statement or finding to the contrary, that McNeil's testimony regarding the function of the Shear was uncontested, and that petitioners failed to adduce any evidence concerning the nature of Prolerized's operations, despite an explicit invitation from the administrative law judge to do so (Pet. App. 8a). Accordingly, the court held that the record would support no factual determination other than the Board's and that therefore the Board acted properly in resolving the coverage question without a remand for further findings (*id.* at 8a-9a).

ARGUMENT

1. The result reached by the court of appeals is correct and follows directly from this Court's decisions under the Longshoremen's and Harbor Workers' Compensation Act. Persons who "spend *at least some* of their time in indisputably longshoring operations" are engaged in maritime employment by occupation and are therefore covered employees within the meaning of 33 U.S.C. 902(3). *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977) (emphasis added). A land-based worker who performs "some portion" of the movement of cargo between ship and land transportation "is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 82-83 (1979). Under these principles, respondent McNeil would be a covered employee under Section

2(3), even if the only aspects of his job to be considered were his occasional manning of lines on the dock, repair of loading equipment aboard ship, and assistance in the actual loading operation.[4] And, as we have recently argued in another case under the Act,[5] we do not believe that there is any conflict among the circuits regarding this proposition.

Petitioners cite a number of cases that assertedly adopt a standard for "maritime employment" more stringent than the one described above and derived from *Caputo* (see Pet. 7), but those cases do not support the allegation of a live disagreement among the courts of appeals. *Maher Terminals, Inc.* v. *Farrell*, 548 F.2d 476 (3d Cir. 1977), was decided before *Caputo*, and the Third Circuit has recently acknowledged that, in light of *Caputo*, the court's earlier emphasis on a worker's primary duties "may have reflected too narrow an interpretation" of the Act. *Dravo Corp.* v. *OSHRC*, 613 F.2d 1227, 1233 n.9 (1980). *Cargill, Inc.* v. *Powell*, 573 F.2d 561 (9th Cir. 1977), involved a dock worker who, in the view

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[4] The court of appeals stated that the administrative law judge's characterization of McNeil's conventional longshoring work as "occasional" "appears to have been unwarranted" (637 F.2d at 38 n.3). (As reprinted in the appendix to the petition, the court of appeals' opinion erroneously includes the word "warranted" where "unwarranted" should appear. See Pet. App. 13a n.3.) In view of the court's reliance on McNeil's work with respect to the Shear, however, the court found it unnecessary to reach the Director's contention that McNeil's more conventional longshoring duties were alone sufficient to establish coverage under the Act.

[5] See *Howard Trucking Co.* v. *Boudloche*, petition for cert. pending, No. 80-1563 (filed Mar. 14, 1981), Br. for the Fed. Resp. in Opp. at 6 & n.5. We are supplying copies of this brief to the parties in the present case.

of the panel majority, had *nothing whatever* to do with the loading and unloading of ships. (In any event, this Court vacated and remanded the decision in *Powell* for reconsideration in light of *P.C. Pfeiffer Co.* v. *Ford, supra.* See 444 U.S. 987 (1979).[6]) *Fusco* v. *Perini North River Associates*, 622 F.2d 1111 (2d Cir. 1980), cert. denied, Nos. 80-639 and 80-651 (Jan. 26, 1981), concerns an issue altogether different from the amount of longshoring activity a worker must perform before he can be said to be "engaged in maritime employment" by occupation.[7]

Moreover, and more important, *this* case does not present an opportunity to resolve the conflict petitioners purport to discern. The court of appeals did not hold, as petitioners contend, that respondent McNeil was engaged in maritime employment solely because he "occasionally" engaged in longshoring activities. On the contrary, the court ruled that "a *substantial* portion of McNeil's duties involved longshoring activity" (Pet. App. 11a; emphasis added). Petitioners may challenge that factual conclusion, of course, but they may not argue that this Court should grant review to resolve an alleged conflict with circuits that supposedly require substantial, not merely occasional, longshoring activity as a precondition for employee status under Section 2(3).

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[6] On remand, the court of appeals withdrew its opinion and affirmed the Benefits Review Board's decision that the injured worker *was* covered by the Act. 625 F.2d 330 (1980).

[7] Judge Wyzanski, who wrote the opinion for the court of appeals in *Fusco*, joined in the panel's opinion in the present case. This circumstance further belies petitioners' assertion that there is some inconsistency between *Fusco* and the decision below.

2. The second question presented by petitioners is based on the false premise that the court of appeals affirmed the Benefits Review Board's decision on a ground not addressed or relied upon by the Board (Pet. 9-11). Notwithstanding petitioners' apparent impression to the contrary, the Board, like the court of appeals, relied in part on respondent McNeil's regular repair and maintenance and occasional operation of the Shear as a basis for the conclusion that McNeil was engaged in maritime employment (Pet. App. 38a). McNeil's duties in connection with the Shear unquestionably constituted a significant portion of his job;[8] the Board did not say anything to the contrary. The court of appeals properly followed the Board in considering those duties as part of McNeil's contribution to the overall loading operation, and the court did not overstep its bounds by concluding that a *substantial* portion of McNeil's duties involved longshoring activity. The fact that the Board's opinion did not use the word "substantial" in describing the extent of McNeil's involvement in the loading process does not preclude the court of appeals from applying that quantitative term to the very activity on which the Board relied in reaching its coverage decision.

3. For the reasons well stated by the court of appeals (Pet. App. 8a-9a), the Benefits Review Board

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[8] Although petitioners assert (Pet. 8) that McNeil's responsibility for the Shear during his months on the night shift was limited to the weekly changing of the machine's filters, the court of appeals correctly observed (Pet. App. 11a-12a) that there was no evidence that McNeil's duties with respect to the Shear were reduced during the months preceding his accident, and in fact McNeil testified without contradiction that maintenance of the Shear was one of his main functions at the time of his injury (*ibid.*).

properly decided the coverage question without remanding for additional findings by the administrative law judge concerning the function of the Shear. Respondent McNeil testified that the Shear's purpose was to cut steel to fit into the holds of ships. The testimony was not challenged or contradicted. In fact, petitioners presented no evidence on this or any other matter regarding Prolerized's operations. Even now, petitioners do not suggest that the Shear cut steel for some other purpose.[9] Nevertheless, because the administrative law judge did not specify the machine's purpose in his decision, petitioners contend that the Board was not authorized to rely on the record testimony concerning the Shear's connection to the loading process. This argument is without merit and is not supported by the court of appeals' decisions on which petitioners rely (Pet. 11-12). The Board's action here does not involve the substitution of an appellate body's views for those of the finder of fact. The Board's comments were fully consistent with the administrative law judge's findings, and the factual accuracy of those comments was and is un-

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[9] The petition in this case does not present any question concerning the correctness of the court of appeals' observation that "the Shear is a physically distinct part of the employer's operation whose sole function is to prepare goods for shipment" (Pet. App. 10a). The court accurately characterized the shearing process as "the functional equivalent of packaging" and analogized it to the marking and checking function performed by the employee Blundo in *Caputo* (*ibid.*). The Shear was in fact, as the court of appeals said, "an intermediate and necessary step in the process of moving cargo from the land transportation on which it arrived to the ships on which it left" (*ibid.*). Accordingly, the Board and the court of appeals were justified in considering respondent McNeil's work on the Shear as longshoring activity within the meaning of Section 2(3).

disputed. In such circumstances, the Board was not required to make its coverage decision solely on the basis of statements within the confines of the administrative law judge's decision, as if the rest of the record did not exist.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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